

1 UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF ARIZONA  
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5 In Re: Bard IVC Filters ) MD-15-02641-PHX-DGC  
6 Products Liability Litigation )  
7 ) Phoenix, Arizona  
8 ) May 29, 2019  
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11 BEFORE: THE HONORABLE DAVID G. CAMPBELL, JUDGE

12 REPORTER'S TRANSCRIPT OF PROCEEDINGS

13 MOTION HEARING  
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**P R O C E E D I N G S**

THE COURTROOM DEPUTY: This is MDL case number  
15-2641 regarding Bard IVC Filters Products Liability  
Litigation on for motion hearing.

Counsel, please announce for the record.

MR. LOPEZ: Good afternoon. Ramon Lopez on behalf of  
the Plaintiffs' Leadership Council.

MR. SELTZ: Good afternoon. Daniel Seltz --

THE COURT: Pull the mic up, would you, please.

MR. SELTZ: Daniel Seltz from Lief Cabraser for the  
plaintiffs.

THE COURT: Good afternoon.

MR. NORTH: Good afternoon. Richard North and  
Matthew Lerner for the defendants.

THE COURT: Good afternoon.

I know we have some folks on the phone as well.  
Let's just have people who wish to say something during this  
hearing who are on the phone identify themselves.

MR. GOSS: Your Honor, Tim Goss for the plaintiffs.

MR. CAPPELLI: Your Honor, Joseph Cappelli for the  
plaintiffs.

MR. BERN: Your Honor, Marc Bern for the plaintiffs.

MR. O'CONNOR: Your Honor, Mark O'Connor. I'm  
appearing telephonically today.

13:01:36 1 THE COURT: Okay.

2 All right. We have a motion that was filed by the  
3 Plaintiffs' Steering Committee back on April 12th which  
4 sought to establish the two funds called for in Case  
13:01:55 5 Management Order Number 6 and also sought an increase in the  
6 amount of the assessment to be made when settlements occur in  
7 this case. The request is to increase the assessment from  
8 8 percent to a total of 14 percent. What that would comprise  
9 would be an increase from 6 percent to 9 percent as an  
13:02:21 10 assessment for common benefit attorneys' fees and an increase  
11 from 2 percent to 5 percent for common benefit costs.

12 I've reviewed the motion, the responses filed by  
13 Bard, by the Bern firm, by the Freese and Matthews firms.  
14 There's been lots of joinders as well. And then the reply  
13:02:56 15 filed by the plaintiffs. And I went back and reread Case  
16 Management Order Number 6.

17 I think what we ought to do now that this briefing  
18 is done is give Plaintiffs' Steering Committee an opportunity  
19 to address any additional matters they would like. I'll then  
13:03:10 20 be happy to hear comments from Bard if they wish to make  
21 them, but also from the folks on the phone who wish to say  
22 something about this issue, particularly it looks like  
23 Mr. Goss, Mr. Cappelli, and Mr. Bern would like to do that.

24 Mr. Lopez, let's start with you, please.

13:03:31 25 And if you would, pull both mics in so the folks on

13:03:35 1 the phone can hear you.

2 MR. LOPEZ: So just so the Court -- I've been on all  
3 different sides of this issue. I understand it's one where,  
4 depending on where your perspective is, you look at it  
13:03:49 5 differently. I mean, I've been objected, I've been in the  
6 middle, and I've been on committees where we thought the  
7 original assessment was not high enough. So --

8 So the Court knows the genesis of this, part of our  
9 duties as lead counsel or co-lead counsel in this case as an  
13:04:10 10 executive committee, if the Court will recall we had an  
11 executive committee that was formed about a year and a half  
12 ago or so, and those members and I discussed frequently  
13 various administrative things, including things like this.

14 And it's obviously part of our function is to look  
13:04:35 15 at issues like this type of benefit holdback. And, again,  
16 we're not asking the Court to make an assessment today.

17 THE COURT: Hold on just a minute, Mr. Lopez.

18 Somebody on the phone is making a fair bit of noise.  
19 If you all could either mute your phones until you want to  
13:04:53 20 speak or just be a little quieter, that would help us. We're  
21 hearing that in the courtroom.

22 Go ahead, Mr. Lopez.

23 MR. LOPEZ: So when we looked at where we were about  
24 two or three months ago and we -- since that time we've -- and  
13:05:08 25 before we filed this, we kind of looked at where we thought

13:05:12 1 this case might be going and whether or not we had more work  
2 ahead of us and we -- and looking at the lodestar hours to  
3 date and whether or not based on all of that we -- whether or  
4 not -- what was currently the holdback was equitable and fair  
13:05:31 5 for not only the work that had been done, but for the work  
6 that we kind of foresee into the future.

7 And I'll go through those in a bit.

8 This is not about, you know, unjustly enriching  
9 anybody. This is looking at what a good number of us have  
13:05:49 10 done over the last three and a half, going on four years. In  
11 some instances some of us were two or three years before this  
12 MDL to get to us where we are now. And we just feel that in  
13 looking at what some of the recent upward assessments -- not  
14 assessments, but holdbacks in simpler cases, that it was  
13:06:15 15 appropriate for us to make that request of the Court at this  
16 time.

17 The first thing I want to address, and I'll get  
18 into -- I know there's a lot of things about what's happened  
19 in other cases. Of course, we cited cases we think are more  
13:06:32 20 similar to this one, where the assessment or holdback was  
21 actually significantly higher than what we're asking for  
22 here. But it's fairly consistent when you read cases, when  
23 you read best practices, law review articles, and things like  
24 that, that whatever the holdback ultimately is, or even the  
13:06:54 25 assessment, should be tailored to the realities of the

13:06:58 1 particular case as being superior to any other means of  
2 determining a reasonable fee for common benefit counsel. And  
3 that's why we're here, I think, is to show the Court what  
4 some of those realities are in this case.

13:07:13 5 I'm a bit taken aback about the fact that the  
6 defendants think that they have standing to even file an  
7 objection. I'm going to object to the fact that they  
8 shouldn't have standing to file an objection to our request  
9 because none of what they state in their papers has anything  
13:07:31 10 to do with what would be a fair and equitable common benefit  
11 fee or holdback in this case.

12 I mean, certainly I wouldn't be in here suggesting  
13 to the Court that because of the fees that defense counsel  
14 are making in defending these cases that somehow that is a  
13:07:55 15 detriment to settlement. I wouldn't make that accusation. I  
16 don't think that is true and I have no basis of doing so.  
17 But that's essentially what they're doing in opposing what  
18 we're trying to have the Court do for us today.

19 For them to suggest that somehow or other applying  
13:08:13 20 these equitable principles will somehow get in the way of  
21 settlement, I've seen no proof of that. I mean, I know  
22 objecting counsel have suggested that.

23 Again, I don't know that that's even one of the  
24 principles, the equitable principles that should be applied  
13:08:29 25 in determining what the holdback should be in this case.

13:08:32 1 It could be, Your Honor, two years from now those  
2 lawyers that may have settled cases, now they come in and  
3 say, You know, Judge, all this stuff that happened  
4 afterwards, we didn't benefit from this increase, it did not  
13:08:46 5 benefit our clients in any way and -- paying the extra  
6 3 percent that we're asking to you hold back.

7 It could be that when we get here you say, you know  
8 what, I was right the first time when I said 6 percent. But  
9 don't know. There are too many unknowns right now about all  
13:09:06 10 that. You haven't had an opportunity to really look at the  
11 work that's been done as far as the contribution by the  
12 various lawyers and what we have ahead of us.

13 One of the things that you'll see in some of the  
14 papers we filed, Judge Kincaid and Judge Kennelly both  
13:09:26 15 mentioned the fact they don't know anything about the  
16 settlements that have happened in those cases to determine  
17 whether or not the current holdback would be sufficient based  
18 on the settlements that have happened to have time to  
19 sufficiently compensate the lawyers that have done the common  
13:09:46 20 benefit work.

21 Likewise, we didn't know. The Plaintiffs' Executive  
22 Committee and no one that I know of on the Plaintiffs'  
23 Leadership Committee other than I think two or three of the  
24 firms that have objected, have any idea what the settlement  
13:10:01 25 program is with Mr. Goss' firm, Mr. Matthews' firm, and the



13:10:07 1 defendants. No idea.

2 I don't know whether or not -- I'm hearing things,  
3 and based on probably things that I'm hearing, I -- we better  
4 be well prepared to deal with a large number of remands is  
13:10:22 5 basically where I think we are. And if that happens, the  
6 work that our PLC, the PEC, and others who decide to continue  
7 to do this work is fairly vast, and I'll get into those  
8 details in a minute.

9 But I think as Judge Kincaid and Judge Kennelly  
13:10:43 10 rightfully pointed out, how can the Court determine whether  
11 or not the assessment on settlements would adequately  
12 compensate the lawyers for the work they've done even thus  
13 far? We don't know. We don't know whether or not the amount  
14 of the settlements that have -- and by the way, those  
13:10:59 15 settlements were entered into by lawyers who are not part of  
16 our common benefit group, not part of the Leadership Council  
17 that's authorized to do work in this case.

18 And it's worth pointing out one of the lawyers in  
19 the settlement group, Mr. Matthews, is one of the lead  
13:11:18 20 counsel in the Cook litigation, who the same day that we  
21 filed our papers to increase our percentage of holdback from  
22 6 to 9 percent and our costs from 2 to 5 percent, basically  
23 filed our papers in the Cook MDL for the same type of  
24 increase in the assessment or in the holdback.

13:11:39 25 There's a lot of similarities there, there are a lot

1 of common things there. There's one thing that we got  
2 engaged in in this case that I'm not sure that they -- I'm  
3 not even sure but I -- but the Court will recall that the  
4 preemption part of this case, the briefing, the extra  
5 hearings we had, the depositions that were taken, the access  
6 and supplementation of expert reports were not something we  
7 anticipated at the beginning. I don't know how many hours  
8 that was but I know that that is something that is going to  
9 continue.

10 I know that the defendants are bent on seeing this  
11 thing through the Ninth Circuit. We've hired  
12 David Frederick's firm in Texas, who is probably the best  
13 known appellate lawyer and appellate firm that handles  
14 preemption cases on behalf of plaintiffs in these cases, and  
15 he doesn't come at a cheap expense, his hourly rate we're  
16 paying, and that's being funded by our PLC and we've got  
17 members of our PLC that are working with that firm on that  
18 appeal, as well as others.

19 That is headed to the Supreme Court.

20 That's something that we didn't anticipate in the  
21 beginning.

22 We didn't -- nor did we anticipate that a non-PLC  
23 firm a year ago would start the process of developing a  
24 settlement program that we knew nothing about, that that  
25 firm -- those firms are now going around the country bringing

13:13:16 1 other law firms into whatever this settlement program is.

2 Again, I have no idea what that program is. I don't  
3 know whether or not we're going to be dealing with -- I'm  
4 hearing there could be a number of opt-outs from those  
13:13:30 5 settlements. I'm hearing the settlements could go on for  
6 another one to three years before they're finalized.

7 In the meantime, what happens to the cases where  
8 releases aren't presented or where the cases aren't  
9 dismissed? Those are going to become part of your remand  
13:13:47 10 order and those are going to be out in the system, and even  
11 those lawyers that are part of that settlement, I assume  
12 they're going to continue to represent those individuals and  
13 individual cases that have to be tried in the transferor  
14 courts.

13:14:05 15 Again, I think that the focus -- and when you read  
16 the manual, you read cases, you read law review articles and  
17 some best practices articles, your decision should be based  
18 on the posture of this MDL now. And if we were at a point  
19 where we knew what the settlements were, if we knew that  
13:14:29 20 there weren't going to be hundreds, if not thousands, of  
21 remands, which there may be, or we knew what values were  
22 being paid to 2,000, 3,000 -- there may be 4,000 involved in  
23 that other settlement that added up to a certain number at  
24 the current assessment, and that that would sufficiently  
13:14:54 25 provide equitable and fair compensation to those of us that

13:14:59 1 have not only done common benefit work but will continue to  
2 do so, then we'll be able to address that. But we can't do  
3 that here.

4 I think that's what struck Judge Kincaid and  
13:15:09 5 Judge Kennelly in their increases in the holdback, because  
6 they really didn't know. In both instances, there were  
7 settlements in cases where that wasn't shared.

8 Interestingly, one of the objectors, I can't  
9 remember whether it was the testosterone case or the DePuy  
13:15:28 10 hip case, was objecting because he or she didn't know what  
11 the PLC in that case had settled cases for, what kind of PLC  
12 program was in place, so that they can determine as an  
13 objector to the increase whether or not the settlements were  
14 at a certain level where a certain percentage would, you  
13:15:48 15 know, justly and fairly compensate the common benefit  
16 lawyers.

17 We have just the opposite here, we have -- which is  
18 highly unusual. We have non-PLC lawyers that have  
19 established a settlement program and apparently some kind of  
13:16:04 20 a matrix or something -- I have no details, literally none --  
21 whether or not if that is the program that gets applied  
22 across every case or every firm's group of cases to be  
23 settled, whether or not that percentage is going to equal a  
24 lodestar that is fine for fair and equitable or whether or  
13:16:33 25 not it's a lodestar that is woefully inadequate.

13:16:36 1 But that is something you can determine, Your Honor,  
2 a year or two from now when we know what is in that fund and  
3 what's been assessed.

4 Again, the number of remands, I think -- I don't  
13:16:46 5 know. I can just tell you that it appears that there could  
6 be thousands of remands. And -- I'll get to that in a  
7 second -- and what that means insofar as the continuing work  
8 that we may have to do as a Leadership Council or a PEC or a  
9 PSC, whatever you want to call us.

13:17:11 10 I will add that in many of these cases, like the  
11 DePuy case, we're talking about one product.

12 Here, we have seven different devices.

13 I just had a meeting yesterday with lawyers who are  
14 getting a case prepared in this litigation because they  
13:17:29 15 wanted to know, you know, what was our trial package, what  
16 was -- what our advice was for that case. If it -- it  
17 involved a product that -- the way that case should be  
18 prepared and tried is unique to -- not only to that device,  
19 but to when that person got the device, when that client,  
13:17:52 20 when that plaintiff got that device.

21 So a lot of this -- you know, it's not a  
22 one-size-fits-all trial package they're putting together.  
23 There are going to be, you know, various buckets of different  
24 types of evidence that are going to come in. Even in the G2  
13:18:08 25 case that's been on the market for six years, you know, the

1 way the warnings have changed, the way the literature  
2 changed, the way the FDA's involvement changed. Those all  
3 changed.

4 So these trial packages are going to be something  
13:18:21 5 that -- we've made a lot of progress but we know that that's  
6 going to require ongoing work by our PLC.

7 We've already talked, Your Honor, last time we were  
8 here, I think, about the expert preservation depositions that  
9 have to be taken. That -- I mean, even if there are only  
13:18:41 10 hundreds of remands, that's something I think both sides  
11 agree we'd have to do.

12 I also think that there are going to be a number of  
13 corporate witness preservation depositions. These cases are  
14 not going to be, for the most part, tried in Arizona. A lot  
13:18:57 15 of the people we saw live here are not going to appear live  
16 in other jurisdictions, other states.

17 Some of these depositions that have been played are  
18 stale. Some of them are dated 2010, '11, '12, '13, '14. Key  
19 deposition been played in every trial. And there's been a  
13:19:19 20 lot of things that have changed with respect to -- I mean,  
21 just the evidence in the case, the FDA's involvement in the  
22 case, the 510(k) process, the medical literature, the amount  
23 of complaints that have come out, and frankly, the market.  
24 There are some of these devices that are no longer even being  
13:19:35 25 marketed in other countries, they've been disallowed to be

13:19:38 1 marketed. Those types of things.

2 There's probably good cause for some litigant to go  
3 to his or her judge in a federal court to say, Judge, this  
4 deposition was taken in 2013 of the medical director and  
13:19:49 5 there's been a number of things that have changed between now  
6 and then, and we think that we should be able to take at  
7 least an updated deposition of that individual.

8 THE COURT: Let me ask you a question on that,  
9 Mr. Lopez. Assuming that happens by some litigant in some  
13:20:05 10 court somewhere, why does the taking of that deposition become  
11 a common-benefit expense?

12 MR. LOPEZ: Well, because the issue is whether or  
13 not -- I mean, that's a whole 'nother -- one of the things I  
14 read in preparing for today is your ongoing communication with  
13:20:29 15 transferor courts when they're faced with things like that.  
16 And maybe you're faced with it from four or five different  
17 judges where they're getting the same requests for the  
18 deposition.

19 And the question is whether or not, as part of this  
13:20:45 20 process, this MDL process that's supposed to resolve those  
21 sorts of things and not really -- and just get sent back to a  
22 court and things don't change.

23 The chances of that happening here -- I've already  
24 talked with -- I mean, even the people I met with yesterday  
13:21:05 25 want to take updated depositions of some of these corporate

1 witnesses and certainly want to take the depositions of the  
2 people that appeared live in trial because they don't have  
3 the video depositions of the testimony that was given here in  
4 trial.

5 So that becomes an issue whether or not you do that  
6 as an ongoing part of being the MDL judge, whether or not  
7 three judges who are faced with the same request coordinate.  
8 There's a lot. In one of the articles I read, a best  
9 practices article from Duke, they talked about being a  
10 coordination within a court.

11 And you're right, maybe that's not something that  
12 you have to address, and that's a deposition that gets taken  
13 in that case and gets applied to all other cases. I mean,  
14 that's possible. But I don't know. I don't know what the  
15 transferor courts might ask you to do if they get hit with a  
16 number of these requests.

17 I know that's not something that is unexpected,  
18 especially if you're talking about every court in America  
19 potentially getting any number of these cases, maybe even  
20 some hundreds of them.

21 But, again, I'm anticipating that that's something  
22 that I would prefer not to have to personally be involved in,  
23 but whether or not I'm going to be -- I or others are going  
24 to be consulted about that, or maybe even ask us to bring  
25 that to your attention, I mean, I don't know. That's some of



13:22:55 1 the unknown that we're dealing with here and why we think  
2 just the holdback, not an assessment, but preparing for -- I  
3 frankly think the holdback should be greater based on what  
4 I'm anticipating is going to happen. Potentially could  
13:23:11 5 happen in the future. I think we're being a lot more  
6 reasonable than they were being in the testosterone and the  
7 DePuy case. Under the circumstances, I think are more  
8 supportive of us being at their level. So we came to a  
9 number where we thought was a fair and reasonable holdback  
13:23:34 10 under these circumstances.

11 There are people that are asking for access to  
12 our -- to the common benefit, you know, the MDL PLC experts.  
13 Some of them don't want to use a deposition. And we're going  
14 to have to continue to monitor that and make sure that we're  
13:23:57 15 the people that are kind of monitoring that and making sure  
16 that these -- that these experts are protected from not  
17 getting involved in a case that maybe they shouldn't get  
18 involved in.

19 We already talked about the organization of trial  
13:24:11 20 packages.

21 Depending on whether there is 100 remands or 2,000  
22 remands, we feel that we're obligated to have multiple trial  
23 package presentation seminars. You know, maybe various --  
24 maybe two or three of those.

13:24:27 25 We talked about the coordination and consolidation

1 of cases in transferor courts. That's something that may or  
2 may not -- I mean, it could be the transferor court says I  
3 want Mr. O'Connor or I want someone that was involved with  
4 Judge Campbell to come here and tell me what -- what he  
5 thinks about that or what she thinks about that.

6 Of course, we have to maintain the depository, we  
7 have to update discovery, these complaint files continue to  
8 come in. There could be good reason for there to be a  
9 nationally coordinated deposition of some of these what I  
10 would call older depositions, something we already talked  
11 about.

12 The bottom line, Judge, here, is I think that -- I  
13 can't foretell the future but I can just kind of -- I'm  
14 getting a glimpse of it, that unlike maybe the overwhelming  
15 majority of cases, MDL cases -- and I've got to be careful  
16 what I say because I don't -- some of this involves strategy  
17 some of it involves ongoing settlement discussions -- but I  
18 foresee a reasonable chance that Bard is going to be happy  
19 allowing a number of these cases to be remanded and just deal  
20 with them one at a time as they come up, which would have  
21 accomplished nothing by way of this MDL, and I think we still  
22 have to be in a position to make sure that doesn't happen.

23 I mean, you even said, I think at the end of one of  
24 our bellwether trials, that you wonder what might happen with  
25 different rulings in front of a different jury and different

13:26:23 1 state laws.

2 I think while you wouldn't call that officially a  
3 bellwether process, it is going to be. I mean, they're going  
4 to be the first four, five, or six cases that get tried in  
13:26:36 5 different jurisdictions where they don't have an FDA defense  
6 or where -- or different 403 rulings come in based on  
7 different evidence. Or who knows. We saw a glimpse of three  
8 cases that -- we almost saw one in the Recovery case that got  
9 resolved.

13:27:03 10 But there are some things that we as a leadership  
11 group have to understand that the bellwether process here was  
12 an important one. But personally -- I'm just saying  
13 personally I'm not seeing that it had much of an effect on  
14 the full and final and global resolution of this litigation.

13:27:24 15 Again, I wish I could go into more detail about  
16 that, but I can't because of confidentiality issues and other  
17 issues that I think might affect ongoing discussions about  
18 that. But I can just tell you, I don't know what the risks  
19 are, what the chances are, we're all kind of playing chicken  
13:27:45 20 here between now and July 1st whether or not cases are going  
21 to settle or cases are not going to settle and they're going  
22 to be put on your remand list for July 15.

23 I don't know whether that number is going to be only  
24 my cases or whether or not it's going to be my cases plus a  
13:28:00 25 number of other firms that I've been in communication with

13:28:04 1 that seem to be in that -- are planning for that potential.

2           So, again, Your Honor, I can just tell you that this  
3 was not -- this is something that we did after much  
4 deliberation and we knew there was going to probably be  
13:28:32 5 objections to this, especially by those that are involved in  
6 some settlement program that we know nothing about, whether  
7 or not -- I haven't seen any dismissals be filed yet. I  
8 don't know whether releases -- I don't know whether there is  
9 an opt-out provision in that settlement program, which, if  
13:28:52 10 there are, I don't know how many that would be, what that  
11 would do as far as the type of remands that you would have to  
12 deal with.

13           But we feel that in fairness and in equity to not  
14 only the work that's been done thus far, but to what we  
15 anticipate the work will be -- there is no one in this world  
16 other than the person standing in front of Your Honor who  
17 wishes he didn't have any more obligations or duties to do  
18 common benefit work in this case. I mean, there are a lot of  
19 other projects in my firm or others that I could be looking  
13:29:31 20 at right now that are going to certainly be more lucrative  
21 than the potential of a 6 percent or a 9 percent assessment  
22 of what my firm's ultimate lodestar or my firm's ultimate  
23 common benefit award might be.

24           So I'm here on behalf of not just myself, but I  
13:29:50 25 think a number of -- certainly on behalf of the entire PEC,

13:29:54 1 which are six member firms that I won't say did all the work  
2 but certainly did a good majority of the common benefit work,  
3 as well as a number of others that are not on our executive  
4 committee that support this.

13:30:10 5 I mean, interesting that only two of -- I think only  
6 two of our PLC members objected. I'm told one may be  
7 withdrawing their objection. I've heard that. But I know  
8 there is one that is involved in this other settlement who  
9 has objected to this, but that's the only firm that has.

13:30:34 10 There are others on the phone.

11 Mr. O'Connor, Ms. Fleishman, or Daniel, if there is  
12 anything that I failed to present to the Court you think I  
13 should have or you think we should bring to his attention.

14 May they speak, Your Honor, if they do?

13:30:53 15 THE COURT: Yes, they may.

16 Thank you, Mr. Lopez.

17 MR. LOPEZ: Thank you, Your Honor.

18 THE COURT: Do any other members of the Plaintiffs'  
19 Steering Committee wish to speak?

13:30:59 20 All right.

21 Let's hear from Bard next, and then we'll hear from  
22 the plaintiffs' attorneys who are on the phone.

23 MR. NORTH: Thank you, Your Honor.

24 As the Court is aware, Bard opposes any increase at  
13:31:14 25 this point in the assessment percentage for the common

13:31:16 1 benefit fund. We believe that the present assessment at  
2 8 percent is reasonable and that the plaintiffs have not  
3 offered a persuasive justification under the law or prior MDL  
4 practice for the increase they're seeking, and we therefore  
13:31:30 5 ask that the motion be denied.

6 But let me address, if I could, at the outset, the  
7 plaintiffs' suggestion that Bard has no standing to oppose  
8 this request.

9 Candidly, we admit we do not have standing of the  
13:31:43 10 same enormity that some of the plaintiffs' attorneys do who  
11 have expressed their opposition, but we still have a concrete  
12 interest in what the percentage for the common benefit fund  
13 assessment is. And that's for a couple of reasons.

14 We believe it's axiomatic that any increase, and  
13:32:04 15 particularly the 75 percent increase from 8 percent to  
16 14 percent that they're seeking will be a disincentive or at  
17 least a hindrance to settlement discussions.

18 The plaintiffs originally said, well, it won't  
19 affect settlement discussions because it will have no impact  
13:32:23 20 on the clients, individual plaintiffs themselves. As they  
21 later conceded in the supplemental filing, that's not true.  
22 They're asking just for the cost assessment alone to be  
23 increased from 2 to 5 percent, which will come directly out  
24 of an individual plaintiff's pocket.

13:32:41 25 And I also think it is too simplistic to say it will

13:32:45 1 have no effect, an increase, on future settlements as far as  
2 the attorneys are concerned. The individual attorneys.  
3 Because they say it's not their concern. Their client is  
4 still going to get the same amount.

13:33:01 5 But the fact of the matter is, as a practical  
6 matter, clients, the vast majority of them make the decision  
7 whether to settle based upon the recommendation of their  
8 attorneys. And the higher the assessment percentage goes,  
9 the less individual plaintiffs' attorneys will want to settle  
13:33:21 10 for rates or values that are acceptable to Bard.

11 THE COURT: Aren't you suggesting with that last  
12 comment, Mr. North, that plaintiffs' lawyers would act  
13 unethically and would advise their clients not to settle  
14 because the lawyer isn't getting enough personally out of the  
13:33:38 15 case?

16 MR. NORTH: Your Honor, I would hope not.  
17 Professionally, I would hope not.

18 THE COURT: I would think not. And if not, then  
19 that's not a concern, is it?

13:33:47 20 MR. NORTH: But I think with advising, Your Honor,  
21 people would have that in mind. It's a concern. I'll just  
22 say that. It is a concern.

23 I understand what the Court is saying. I agree it  
24 should not be a factor, but we do have a concern that it  
13:33:59 25 might be.

13:34:01 1 But more important -- or equally important,  
2 Your Honor, what we're facing here is the fact that a great  
3 number of plaintiffs and plaintiffs' attorneys who have  
4 either settled cases or tentatively settled cases with Bard  
13:34:15 5 have relied upon the existing 8 percent assessment. The CMO  
6 Number 6, which set the 8 percent, said that that amount or  
7 that percentage shall not be altered.

8 We have a firm settlement agreement for  
9 approximately 1900 cases with the Freese and Goss and  
13:34:35 10 Matthews firms, of which I think about 15- or 1600 are in  
11 this court that we discussed at a previous hearing I think in  
12 February.

13 Since that time, we have reached tentative  
14 settlements or are approaching what we believe momentarily  
13:34:51 15 will be settlements with as many as 22- or 2300 individual  
16 plaintiffs, if not more.

17 I believe the specter of the mass remands that  
18 Mr. Lopez paints is not necessarily correct. But that's as  
19 an aside.

13:35:06 20 The fact of the matter is we probably have either  
21 settled or on the brink of settlement half of the cases in  
22 this -- at least in this MDL. And those settlements or near  
23 settlements have been reached based upon plaintiffs' reliance  
24 upon the 6 percent. I mean the 8 percent. And we are  
13:35:28 25 concerned as to what effect that's going to have,



13:35:31 1 particularly on those settlements that are just about  
2 finalized but not inked in a settlement agreement yet.

3 I would note, Your Honor, that we believe that the  
4 amount they're seeking is abnormally high. We pointed out a  
13:35:45 5 lot of statistics in our filings. We pointed out the fact  
6 that we -- well, we surveyed as best we could all MDLs in  
7 comparable MDLs since 2010. We were able to compute that the  
8 mean assessment rate for common benefit funds for those MDLs  
9 was 7.4 percent and the median was 6 percent.

13:36:09 10 All -- the median and the mean of all of those prior  
11 percentages is less than the 8 percent that's already in  
12 effect in this MDL.

13 Interestingly, of the several dozen MDLs we have on  
14 that chart, we were only able to only identify six MDLs that  
13:36:28 15 have a rate as high as the 14 percent they are now seeking.

16 And as we noted, most commentators say that  
17 historically between 4 -- I mean, the assessment rate for the  
18 common benefit fund has been between 4 and 6 percent.

19 Your Honor, I would also note that the plaintiffs,  
13:36:47 20 we believe, have not presented a persuasive justification for  
21 the increase they seek.

22 Mr. Lopez focused primarily on post MDL activities  
23 after remand and what would be necessary, in his view, for  
24 counsel -- or leadership council.

13:37:06 25 We submit that that's not the appropriate work to be

1 reimbursed or compensated by the common benefit fund. As  
2 this Court has pointed out many times to us, the purpose of  
3 an MDL is for pretrial coordinated discovery. This Court  
4 went one step further and conducted three bellwether trials.

5 But the purpose of the MDL is discovery.  
6 Coordinated discovery. They had performed those duties and  
7 that's what the common benefit fund is established to  
8 compensate them for. Not for all of the work that will be  
9 done in cases or may be done in cases, and that is  
10 speculative at this point, throughout the country. That, by  
11 definition, Your Honor, is not common benefit, and it's  
12 certainly not common benefit for the purpose of this MDL.

13 Some of the other justifications they offer in their  
14 briefs we believe are equally unpersuasive. They claim this  
15 MDL has been unduly prolonged. But the fact of the matter is  
16 the overall schedule of this MDL has lasted for less than a  
17 year more than what the parties and the Court originally  
18 planned.

19 It has been run efficiently. And virtually all  
20 discovery in this MDL was completed by 2017. And the last  
21 two years have not been extensive work other than the  
22 bellwether trials.

23 They also suggested, oh, we've tried so many cases.  
24 The fact of the matter is in October, I think it was in 2015,  
25 at this Court's initial status conference or case management

13:38:44 1 conference, the plaintiffs specifically talked about  
2 envisioning three to five bellwether trials, and we've had  
3 three. So at the time they sought the original assessment  
4 and the sought 9 percent and the Court awarded them  
13:38:56 5 8 percent, they knew or anticipated at least three bellwether  
6 trials, exactly what's occurred.

7 Perhaps most confusingly, they suggest that things  
8 have changed because they didn't envision this many cases.

9 They envisioned, they said, about a thousand cases  
13:39:13 10 when they sought the original assessment and that now that we  
11 have 7,000-plus.

12 Well, when they sought the initial assessment, they  
13 justified the fact that it was above the mean because there  
14 wouldn't be as many cases. And they needed to have a higher  
13:39:30 15 percentage than the mean.

16 Well, by their own logic, the fact that we have  
17 seven times more cases whose settlements they will get the  
18 assessment from, by definition means they should not have an  
19 increase; if anything, they should have a decrease. But  
13:39:50 20 we're not asking for that, of course, but by their own logic,  
21 no justification -- or no increase would be justified there.

22 Your Honor, lastly, I would suggest and respectfully  
23 dispute Mr. Lopez's characterization that the Plaintiffs'  
24 Leadership is in the dark and something is going on  
13:40:10 25 clandestine behind their back.

13:40:13 1 The fact of the matter is in these settlements that  
2 have been reached, or tentative settlements, at least six and  
3 I think maybe seven members -- or firms who are represented  
4 on the Plaintiffs' Steering Committee are involved and have  
13:40:27 5 tentatively committed to settlements.

6 Discussions are ongoing with all the members of the  
7 Plaintiffs' Executive Committee. Records are being reviewed  
8 of their cases. Discussions are ongoing. There may not be  
9 final resolutions with the members of the Executive  
13:40:44 10 Committee, but they are not in the dark and have not been  
11 excluded from this process.

12 Your Honor, in conclusion, we believe CMO Number 6  
13 has a generous assessment, 8 percent, above the mean and  
14 median in all MDLs overall. It is an assessment that this  
13:41:05 15 court originally stated shall not be altered, and settlements  
16 have been reached in reliance on that. And we believe, as  
17 I've said earlier, that the increase they're seeking will  
18 simply hinder our efforts to completely resolve the cases in  
19 this MDL. And for that reason we would ask that the motion  
13:41:23 20 be denied.

21 THE COURT: Thanks, Mr. North.

22 Let's hear comments by Mr. Goss on the phone.

23 MR. GOSS: Thank you, Your Honor. My flight was  
24 canceled for weather and I appreciate the opportunity to  
13:41:41 25 appear telephonically.

1 I'd like to make two comments at the beginning.

2 The first one is we've worked with Mr. Lopez and his  
3 firm and members of the Leadership Committee for quite some  
4 time in this litigation and other litigation. And by no  
5 means is our objection or opposition to this any comment on  
6 their work. They're good lawyers and they've done good work.

7 But what we do have a problem with is we're simply  
8 saying that the increase in the assessment over 8 percent is  
9 just not warranted in this situation.

10 Secondly, Your Honor, I'd like to address a  
11 statement that the Leadership made in the reply brief  
12 regarding our firms. Essentially they made a statement that  
13 we weren't familiar with the key issues in this litigation.

14 Your Honor, that's just not so. My firm has had --  
15 early on on the Bard PSC. We've submitted thousands of hours  
16 in this MDL and in other MDLs. We've prepared state court  
17 Bard cases for trial. We've obviously done settlement --  
18 incidentally, Your Honor, I think it's important that we  
19 haven't billed a single hour to this MDL for any of the  
20 settlement work we've done.

21 We've expended a lot of money on this case and on  
22 IVC cases in general. Mr. Matthews handled depositions for  
23 the *Booker* bellwether case. Mr. Chavez, with Mr. Matthews'  
24 firm, was on the team for the *Hyde* bellwether trial.

25 Importantly, Your Honor, we're total lead counsel

13:43:18 1 with Mr. Lopez's firm in the *Cordis* IVC litigation, we're  
2 total lead counsel in the *Cook* IVC litigation. And,  
3 importantly, in the six cases that have been tried to jury  
4 verdicts, Mr. Matthews and I tried two of those. One of the  
13:43:32 5 cases is actually being appealed in the Houston Court of  
6 Appeals.

7 So the notion that our opposition is somehow without  
8 merit because we're not familiar with the litigation is  
9 simply incorrect, Your Honor.

13:43:43 10 With respect to our specific objections regarding  
11 assessment, and I won't step on the arguments that have  
12 already been made, but our first basis is that the 8 percent  
13 is a sufficient assessment, Your Honor.

14 If you'll recall, the Leadership asked for a  
13:44:03 15 9 percent assessment at the beginning. They -- they knew  
16 less than than they know now, and they asked for 9 percent  
17 back then.

18 The fact of the matter is, Your Honor, the only  
19 cases they rely upon are quite different than the ones in  
13:44:23 20 this situation.

21 They rely on the *Pinnacle* hip litigation MDL case.  
22 *Pinnacle* was different, Your Honor. *Pinnacle* had been  
23 ongoing for eight years, remains ongoing, and has had five  
24 bellwether trials. They had judgments appealed to the Fifth  
13:44:36 25 Circuit that have gone back -- remanded back from the Fifth

13:44:40 1 Circuit. So that case is not at all similar to this  
2 situation.

3 They cite the testosterone litigation MDL. In the  
4 testosterone MDL they've conducted eight bellwether trials in  
13:44:52 5 a four-year period. And that court, Your Honor, specifically  
6 found that the PSC could not have anticipated that despite  
7 having thirty PSC firms involved in the case that it would  
8 still need to go outside and get non-PSC firms to come handle  
9 another three waves of bellwether trials. So that case  
13:45:14 10 really doesn't support the position for an increase in our  
11 situation.

12 Our second basis, Your Honor, is that they -- that  
13 this has failed to show anything that was unanticipated from  
14 the outset.

13:45:30 15 They said they originally predicted there would be a  
16 thousand or 2,000 cases. There's now I think close to 7600  
17 cases. That would suggest that there should be a decrease in  
18 the assessment, not an increase.

19 And interestingly about that, Your Honor, you may  
13:45:49 20 recall back when we announced our settlement in February,  
21 there was some discussion about how Bard is requiring cases  
22 to be filed. So almost 1500, 1600 cases, if the Court will  
23 recall, were immediately filed.

24 So those are cases that were added just recently  
13:46:06 25 that didn't increase any work that the PSC had to do, the

13:46:14 1 mere fact case numbers had gone up. Those cases were added  
2 because of Bard's requirement when they were settled.

3 I think I have seen recently a flurry of filings as  
4 well, and I think -- my suspicion is that it relates to the  
13:46:26 5 fact that the direct filing order is about to conclude so a  
6 lot of cases are being filed. Those cases haven't had --  
7 have not added to any work that the steering committee's had  
8 to do over the past four years. So the fact that there's  
9 more cases actually benefits the leadership in this situation  
13:46:45 10 and doesn't suggest that an increase would be appropriate.

11 The PSC argues they didn't anticipate a preemption  
12 motion. Your Honor, I think it would be malpractice in  
13 today's times for a defense firm not to allege a preemption  
14 motion in a case involving the FDA. I've yet to see one  
13:47:04 15 where it wasn't brought. I think it was actually pled by  
16 Bard in this case before CMO 6 was even entered. So I don't  
17 think the fact that -- I think it's unpersuasive to state  
18 that a preemption motion couldn't have been anticipated.

19 I think, as Mr. North noted, three bellwether  
13:47:26 20 trials, those were anticipated early on. I think that the  
21 PSC representative anticipated three to five bellwether  
22 cases.

23 Lastly, with respect to this additional work and the  
24 ongoing work to do for post remand, obviously the 28 USC 1407  
13:47:46 25 mandate is for consolidation for pretrial.



13:47:50 1 And this Court is about to fulfill that mandate.  
2 The PSC is about to fulfill that mandate. I'm aware of no  
3 authority to continue to submit time for common benefit work  
4 once cases are remanded.

13:48:08 5 I'm hearing -- I've heard arguments anywhere from a  
6 hundred to a thousand new cases could possibly be remanded to  
7 transferor courts around the country. I'm not sure whose  
8 cases those are. I'm not sure if they're leadership's cases.  
9 I'm not sure how long that's going to go on. But there has  
13:48:28 10 to be some finality to this, and I don't think 1407 ever  
11 anticipated that there would continue to be assessments or --  
12 I'm sorry, submission of time and common benefit work for  
13 cases after the MDL's been concluded.

14 And, Your Honor, I think that you hit on the  
13:48:44 15 question when you asked Mr. Lopez about this with respect to  
16 who makes those rulings.

17 Well, Your Honor, when the cases get transferred to  
18 these transferor courts, presumably that judge and the  
19 attorneys in that case are going to be handling that. I  
13:49:03 20 can't imagine a situation where they're going to be -- even  
21 if they could, come to Your Honor and to the PSC lawyers to  
22 have discovery issues decided in the MDL court. I don't  
23 think that's appropriate.

24 Likewise, I don't think that the submission of time  
13:49:20 25 for that work is appropriate.

13:49:22 1           There has to be finality. If there's truly going to  
2 be thousands of cases going on, this could go on forever.

3           And Mr. Lopez discusses holdbacks. Well, right  
4 there's a problem with a holdback. The holdback could be  
13:49:40 5 held back for years. Even in a situation where the common  
6 benefit submissions are cut off, like Judge Goodwin has done  
7 in the pelvic mesh litigation, he cut off common benefit  
8 submissions a long time before any cases were remanded.

9           But even in a situation like that, it would take  
13:50:06 10 years. The mesh assessment is being appealed still to the  
11 Fourth Circuit. So it will be three, four years down the  
12 road. And I think Mr. Lopez admits that. Even under his  
13 scenario it could be even longer.

14           So -- and the reason that's a problem, Your Honor,  
13:50:27 15 is that these clients, they have a lot more expenses than  
16 just what's being assessed against them. They have -- each  
17 of them typically has had a CT, an expert read that CT,  
18 medical records, filing fees, and related subpoenas and so  
19 forth. So they typically have 2- to \$3,000 worth of expenses  
13:50:52 20 that are outside of the assessment that they think -- that  
21 their non-PSC lawyer has incurred.

22           So if they get funds from a settlement, what will  
23 happen is attorney fees are taken out, the non-MDL  
24 assessments are taken out, a holdback is taken out, and --  
13:51:15 25 Your Honor, these are people that many of them are -- not to

13:51:19 1 mention, Your Honor, they had medical liens. Some of them  
2 are substantial. Medical liens are taken out.

3 So to say that, well, you know, it might -- we might  
4 not take their money, there might be a refund four, five  
13:51:32 5 years down the road, yeah, that doesn't offer a lot of solace  
6 to these people.

7 So -- and I think that's a real problem, Your Honor.

8 Another basis for opposition, Your Honor, is it's  
9 extremely unfair to change this assessment here at the  
13:51:50 10 eleventh hour. Thousands of cases were settled, cases have  
11 been negotiated over the last six or seven months with the  
12 understanding that there's an 8 percent assessment.

13 The PSC's, the substantial part of the rely brief is  
14 arguing that, well, this is just lawyers worrying about  
13:52:11 15 lawyers' money. Ultimately, they had to back off of that  
16 after we called them on it because it's not lawyers worried  
17 about lawyers' money, it's, you know, lawyers worried about  
18 clients' money. Clients don't like to have their money held  
19 back for years when it's unnecessary. That's why the -- you  
13:52:24 20 can't just pick a number out of the air and say, well, let's  
21 just say 14 percent, they did it in a couple of other MDLs.  
22 You can't just pick a number out of the air because this is  
23 real money to these people and it's going to be held for a  
24 long time. A long time.

13:52:39 25 Like anything else, my experience is that if you had

13:52:42 1 money held back, somebody is going to find a way to spend it.  
2 And, yeah, to -- to say, well, they'll get a refund down the  
3 road, that doesn't help out much, Your Honor.

4 And another thing, the reason it takes so long for  
13:53:01 5 there to ever be a refund is because before there can ever be  
6 an award, Your Honor, a lot of things still have to happen.  
7 Fee committees have to be appointed, applications have to be  
8 made for the award, applications have to be made for the  
9 allocations to the particular law firms. Then there has to  
13:53:19 10 be an award and an allocation. There has to be an objection  
11 process. That objection process has to be completed and  
12 there has to be an appeal process. And it goes on for a  
13 long, long time.

14 So it really doesn't help much to say, well, maybe  
13:53:33 15 we'll take 14 percent and, who knows, maybe you'll get some  
16 of it back four or five years from now. That's not very  
17 meaningful, Your Honor. That's why it needs to be tied to  
18 something.

19 And I have heard nothing about any estimates of how  
13:53:48 20 much time that is believed will be expended over the next six  
21 months or year. I've heard no estimates about here's how  
22 much money -- they have a history. Here's how much money we  
23 think we might need to spend. I've heard no estimates on  
24 that.

13:54:04 25 The one thing I have heard that I found very

13:54:08 1 disturbing, and it's in their brief, is that they state  
2 that -- let me get this right -- that they expect there will  
3 be common benefits -- okay, here it is. That the PSC will  
4 continue to fund cases post remand using common benefit funds  
13:54:27 5 and assessments.

6 To me that means the PSC's going to take this money  
7 and they're going to continue to fund cases post remand. I  
8 don't know whose. I don't know if it's going to be these  
9 thousands of cases that everybody's talking about or hundreds  
13:54:42 10 of cases.

11 You know, everything -- every MDL I've ever been  
12 involved in, when the cases get remanded, the lawyers that  
13 get the cases on remand, that's their issue. They deal with  
14 it. They get a trial package, they deal with it. They want  
13:54:56 15 to talk to experts, they pay the experts for their time.

16 So I don't know what that means. If it's just an  
17 unlimited amount of money out there to be spent, it shouldn't  
18 be that.

19 THE COURT: All right. Mr. Goss, make your last  
13:55:17 20 comment, if you would.

21 MR. GOSS: Okay. Yeah.

22 Lastly -- well, two points, Your Honor. Just a few  
23 minutes here.

24 There seems to be some fear by the PSC that there's  
13:55:32 25 not going to be enough dollars at the end of the day to pay

13:55:36 1 the fee that they expected from the outset. And I understand  
2 that. But, Your Honor, the PSC's not insulated from the  
3 highs and lows of litigation. The PSC needs to take the same  
4 risk that we do. Some work out better than others, just like  
13:55:51 5 some cases work out better than others.

6 Finally, Your Honor, I'll say that there's been 16  
7 joinders in our objection. Some from PSC members. The Bard  
8 firm has also filed its own objection. And for four years  
9 the PSC didn't need an increase in the assessment. They  
13:56:08 10 didn't need an increase in the assessment when they're  
11 negotiating their individual cases and settling individual  
12 cases and paid at 8 percent. They didn't need an increase in  
13 2017 when they were making a global demand. And they haven't  
14 shown that one's due now. They didn't even request one until  
13:56:21 15 after we had announced a settlement last February.

16 So for all those reasons, Your Honor, we'd request  
17 the motion be denied.

18 THE COURT: All right. Thank you, Mr. Goss.

19 Mr. Cappelli.

13:56:32 20 MR. CAPPELLI: Yes, Your Honor. For the Bern  
21 plaintiffs, and I'll be very brief.

22 Mr. Goss covered expenses and an amount of issues  
23 that I also would have touched on. But I just want to touch  
24 on really one main point, Your Honor, and that is I have yet  
13:56:51 25 to hear Mr. Lopez, through their papers or through his

13:56:53 1 argument today, articulate a reason, a specific reason for a  
2 necessary increase. Something that was unanticipated. And I  
3 say that because Mr. Lopez is a well-experienced attorney, a  
4 good attorney, an attorney who is well-versed in mass torts.

13:57:12 5 And I find it -- I get taken back somewhat when I  
6 hear that it was -- we couldn't expect bellwethers or we  
7 couldn't expect preemption or we couldn't expect all the  
8 motions.

9 And I take that, and I think the Court has to take  
13:57:31 10 that, with a grain of salt because all of these things are  
11 normal practice when it comes to mass torts. And they should  
12 not be something that is not anticipated by someone in  
13 leadership, especially with the leaders that are involved in  
14 this litigation with their vast experience.

13:57:50 15 Nobody's questioning the work product that these  
16 firms did. What we're questioning here is necessity of an  
17 additional common benefit fee that they themselves can't  
18 articulate why they need it or what the point is.

19 They talk about a whole bunch of things that may or  
13:58:08 20 may not happen in the future, people dropping out. And  
21 Mr. Goss touched on why those things aren't even relevant to  
22 the discussion.

23 But one other issue that I want to touch on and very  
24 briefly is the fact that -- and Mr. Goss touched on this a  
13:58:26 25 little bit -- which is the addition of these cases where the

13:58:29 1 litigation and the MDL has grown. The work product for those  
2 additional plaintiffs hasn't been there or hasn't been  
3 necessitated by the additional plaintiffs.

4 Therefore, you're not necessarily by sheer numbers  
13:58:46 5 seeing additional work. What you're seeing addition to is  
6 additional pot of money that is going to come out of the  
7 regular common benefit fund without the necessary -- without  
8 additional work product having to go to that.

9 So I would agree with Mr. Goss and Bard's attorney  
13:59:05 10 when the number of plaintiffs goes up, the need for the  
11 common benefit fund traditionally should actually be going  
12 down. And we're seeing the opposite here. Once again, going  
13 back to the whole point with no real articulated reason for  
14 it.

13:59:23 15 All other points really were covered by Mr. Goss and  
16 Bard's attorney, Your Honor. And with that, I'll let the  
17 Court go.

18 THE COURT: Okay. Thank you.

19 Mr. Bern.

13:59:37 20 MR. BERN: Your Honor, Mr. Cappelli covered it for  
21 me. Thank you.

22 THE COURT: All right. Thanks.

23 Does anybody else on the phone wish to make any  
24 comment?

13:59:47 25 All right.



13:59:47 1 Mr. Lopez, do you want to respond to any of this?

2 MR. LOPEZ: Your Honor, I'm aware of three of the 22  
3 or 23 PLC firms that are involved in the Freese/Goss/Matthews  
4 settlement who -- I've only talked to two, but both have made  
14:00:11 5 it clear they cannot share with me the details of that  
6 settlement. So I still don't know the details. It's a fact  
7 that two of them do. And neither one of them are objecting,  
8 by the way, to this, at least the two I spoke to, objecting to  
9 this petition that we're making today.

14:00:30 10 Couple things to note is -- and I think the  
11 reasoning in the *Pinnacle* and testosterone cases for the  
12 increase, again in the holdback, not in what we're asking  
13 Your Honor to award, are fairly parallel to what -- the  
14 points that I've made today.

14:00:49 15 The most important thing, however, is to note that  
16 in the *Pinnacle* case, Judge Kincaid increased the holdback to  
17 18.5 percent in fees and 6.5 percent in costs. And  
18 Judge Kennelly, in the testosterone case, increased the  
19 holdback to 14.5 percent in fees and 5 percent in costs.

14:01:16 20 We are asking the Court to hold back 9 percent,  
21 again, under a case in an MDL that has, maybe arguably, more  
22 complexities about it and maybe more things that we're going  
23 to have to deal with in the future.

24 Let's talk about that, Mr. Goss' point about this  
14:01:36 25 going on and on and on. I don't want it to go on and on and

14:01:40 1 on. I think our work as a PLC and the work that we need to  
2 do to make sure folks are adequately prepared and armed to  
3 try their own cases is something that will probably end by  
4 this calendar year. I'm hoping it does. I'm thinking that  
14:01:58 5 by the time we do these preservation depositions and deal  
6 with some of the other issues that we still need to do  
7 despite the fact there's no longer going to be cases here,  
8 but I think things that I think the transferor courts would  
9 prefer and appreciate were done here so they don't have to  
14:02:18 10 address them.

11 Again, if there's an issue with a deposition -- like,  
12 for example, we come to and you say we need to take a  
13 preservation deposition or an updated deposition of  
14 Dr. Ciavarella and you deny that request, fine. Then it  
14:02:32 15 becomes an issue for a transferor court or a group of  
16 transferor courts to get together and decide what they're  
17 going to do about that.

18 So that's up to you.

19 In other words, I'm hoping you tell me, but for some  
14:02:44 20 administrative things that maybe just have to do with this  
21 issue, and that is getting with a special master and putting  
22 together a fee committee, then my work's done. And not only  
23 my work, but the work of those that want to continue to do  
24 this work for folks that might have to try cases.

14:03:05 25 Yes, our PEC and others have committed to whatever

14:03:10 1 the first handful of cases that might be going to trial on  
2 remand that we would continue to treat those as bellwether  
3 cases because we think that's for the good of all litigants  
4 that might get transferred or remanded.

14:03:25 5 You know, a lot of this has to do that us offering  
6 not only you, but maybe these transferor courts from having to  
7 deal with what could be an enormous amount of chaos if there's  
8 not some type of continued coordination and common generic  
9 work done. Like I said, we anticipate that being done by --  
14:03:49 10 including the appeals. The Ninth Circuit appeal is done, I  
11 think, and Ms. Zaic can probably talk to you about that, but I  
12 think there may be reply briefs. But eventually that will be  
13 heard and that will go up to the Supreme Court. I mean, we  
14 can probably give you a -- some kind of a forecast of what  
14:04:07 15 that cost might be --

16 I agree that the concern should be the plaintiffs  
17 here in the cost assessment. We chose 5 percent because we  
18 looked at what was done in testosterone and *Pinnacle* and it  
19 was 5 and -- plus 6.5. I think we would be able to give the  
14:04:27 20 Court a more -- once we find out what cases are settling for,  
21 we might be able to give the Court a better idea of what that  
22 number, what the more realistic number should be and that --  
23 the cost part of this can be something that we can resolve in  
24 a short period of time so that if there is an extra 1 percent  
14:04:49 25 that was held back that the plaintiffs shouldn't have had to

14:04:51 1 pay, they can be reimbursed. And that is something that can  
2 be administered through a third party.

3 But, you know, I'm also taken aback by the fact that  
4 these clients have 2- to \$3,000 in expenses and they might get  
14:05:07 5 hit with another 5 percent. I mean, none of them are getting  
6 hit -- that's the expense in any one of those cases, whether  
7 it be a small case or a large settlement of retaining one  
8 expert, just retaining the expert in the case that they have  
9 the benefit of. So the cost of that, spread out among however  
14:05:27 10 many litigants, are paying 5 percent of your settlement. So  
11 in a \$100,000 settlement, you're paying \$5,000. That's  
12 assuming that's what you agree should be a reasonable cost  
13 assessment, is something that's -- that would cause a  
14 plaintiff who has only spent 2- to \$3,000 thus far to get a  
14:05:53 15 settlement who had to do nothing really more than to have a CT  
16 scan and submit their settlement to a settlement program.

17 So I don't think that argument is a viable one and I  
18 don't think it's something that a plaintiff would say, well,  
19 you know, I got to pay 7- to \$8,000 in a \$100,000 settlement.  
14:06:11 20 I mean, alls you need to do is do what I'm doing with my  
21 clients and saying, by the way, that is saving you hundreds of  
22 thousands of dollars if you were litigating this case alone.  
23 So it's still on a fairness and equitable basis. I don't  
24 think that is going to be a deterrent to any plaintiff  
14:06:31 25 agreeing to a settlement.

14:06:33 1 Again, this additional -- we don't plan to create  
2 work. It could be that you tell us, no, Mr. Lopez, these are  
3 issues that I'm not going to deal with here. I think we've  
4 already agreed that we should be doing trial preservation  
14:06:48 5 depositions of experts and I think that's something we have to  
6 do. But I think there are other things that -- and if you say  
7 no, then it's no.

8 But, again, we're not asking -- I'm just telling you  
9 from the position that I'm in and the position that our PEC is  
14:07:03 10 in, and looking at the work that's been done in this case, the  
11 additional work we anticipate doing over the next six months,  
12 the quality of the work that's been done, the potential  
13 success of this litigation, we feel that in order to protect  
14 those that have done this work and maybe to encourage those to  
14:07:26 15 continue to do the work that needs to be done, that we would  
16 urge the Court to increase the holdback, not the assessment  
17 but the holdback, on attorneys' fees -- originally we asked  
18 for 7 percent and you said 6, and I'm going to ask you to  
19 increase the fee assessment to 9 percent, not the 14.5 or 18.5  
14:07:49 20 that Judge Kennelly and Judge Kincaid respectively did in very  
21 recent similar litigations, and to increase the costs, at  
22 least at this point, to 5 percent.

23 And if you want a better estimate of that,  
24 Your Honor, because I know that involves clients where -- in  
14:08:11 25 fact, I called Mr. Goss and we had a conversation with him and

14:08:14 1 his partner, Mr. Freese, so I wanted to talk to him about that  
2 part of the assessment. I wanted to talk to them about  
3 whether or not that is something that -- if he can give me  
4 some information about his settlement, whether or not that's  
14:08:26 5 something where we might be able to reach some kind of a  
6 compromise. And they said no.

7 I didn't have authority to reduce it, but I had  
8 authority to, through the PEC, to have that discussion. And  
9 I'm still willing to have that discussion. I don't want that  
14:08:45 10 to be a deterrent, and I don't think it is, but I think we  
11 need to be fair to the plaintiffs. But I even think  
12 5 percent -- and even if it was a million-dollar settlement,  
13 a \$50,000 assessment compared to what we've paid to try these  
14 cases is a small fraction of what that plaintiff might  
14:09:03 15 otherwise have to play.

16 So If you have any other questions, Your Honor, I'm  
17 here to answer them and -- but that's all I have to say at  
18 this time.

19 THE COURT: I do have a couple of questions for you,  
14:09:12 20 Mr. Lopez.

21 And I have a question or two for Mr. North as well.

22 I take it, Mr. Lopez, that you agree with the  
23 assertion that if I were to increase the holdback for costs  
24 in the case, that that would be borne by the clients, not the  
14:09:43 25 lawyers. Do you agree with --

14:09:44 1 MR. LOPEZ: Yes, Your Honor.

2 THE COURT: Okay.

3 In your papers, you indicate in your motion that  
4 there has been an assessment, I think you describe it as, or  
14:10:06 5 maybe it's a contribution, from folks on the Plaintiffs'  
6 Steering Committee of \$6 million for costs.

7 MR. LOPEZ: Right. Closer to 7 now, but yeah.

8 THE COURT: I understand that to be money that people  
9 have put into a pot to be used to pay costs that were incurred  
14:10:24 10 in the litigation.

11 That's a different number than what's actually been  
12 spent for costs and expenses in litigation. Now, I have the  
13 most recent report from Judge Corodemus about what's been  
14 spent, and that's not public, that's not something that's  
14:10:47 15 shared with everybody, but it's less than \$6 million.

16 And I assume that -- and it also includes all  
17 expenses incurred through the fourth quarter -- no, I'm  
18 sorry, through the third quarter of 2018, which would include  
19 the last bellwether trial.

14:11:27 20 MR. LOPEZ: Well, for the most part. I mean, some of  
21 those bills probably filtered in after.

22 THE COURT: But it seems to me that the bulk of  
23 expenses were in discovery and all of the travel that had to  
24 be done there and deposition costs and the expert fees in the  
14:11:41 25 bellwether trials, and most of that was submitted in this most

14:11:46 1 recent report from Judge Corodemus through the third quarter  
2 of 2018. I think I'll get the next one pretty soon for the  
3 rest.

4 MR. LOPEZ: Right. She's working on it now.

14:11:56 5 THE COURT: And it's less than \$6 million. So I  
6 assume it's that number that I ought to have in mind when I'm  
7 assessing the costs incurred in the case rather than the  
8 \$6 million that have been assessed of the --

9 MR. LOPEZ: Yeah, I mean, there's money still in that  
14:12:09 10 account. So, yeah. I know there's been a contribution that  
11 has exceeded \$6 million. I know there are expenses that have  
12 been paid since then. Again, I rely on Judge Corodemus. We  
13 give her our complete accounting on everything that we spend,  
14 so she would know.

14:12:27 15 THE COURT: Well, I'm going to do something unusual  
16 and I'm going to have you come up to sidebar so I can ask you  
17 a question about a report that's not public, just to make sure  
18 I'm not misreading it, if you would.

19 (Sidebar discussion reported but not transcribed herein.)

14:19:35 20 THE COURT: Thanks for your patience, Counsel.

21 The entire purpose of that sidebar was so that I  
22 understand the report that I have received, or reports I  
23 should say, from the special master in this case who is  
24 submitting numbers to me about costs incurred and hours  
14:19:54 25 billed, and that is Judge Corodemus. There wasn't any



14:19:57 1 argument on any of the issues that we had talked about at  
2 sidebar.

3 A second -- well, let me -- let me ask you one other  
4 question. Actually, two other questions.

14:20:12 5 The Case Management Order Number 6 does include the  
6 statement which says -- and I'm now looking at Docket 372,  
7 page 10. It says, "The assessment amount is 8 percent, which  
8 includes 6 percent for attorneys' fees and 2 percent for  
9 expenses. The assessment represents a holdback," and then  
14:20:51 10 there's a citation to the Zyprexa case, "and shall not be  
11 altered."

12 That is the language in the Case Management Order.

13 I had Jeff go back and check, Mr. Lopez, and that  
14 language "shall not be ordered" was in the Case Management  
14:21:08 15 Order you proposed. It came from you.

16 So I guess the question I have is what did you  
17 intend, if you remember, when this case management order was  
18 submitted to say that the assessment shall not be altered?

19 MR. LOPEZ: Well, we also submitted with that -- I'll  
14:21:31 20 be honest, I don't remember the genesis of that and why that  
21 was put in. And of course wherever you see the word  
22 "shall" --

23 THE COURT: I know that other phrase in the joint  
24 prosecution agreement --

14:21:46 25 MR. LOPEZ: Okay.

14:21:47 1 THE COURT: -- that says -- the way I read it is you  
2 won't seek an increase unless you think it's necessary.

3 MR. LOPEZ: Right.

4 THE COURT: But I got -- I adopted the "shall not be  
14:21:57 5 altered" language from you and didn't know if you had some  
6 memory of what was intended at the time.

7 MR. LOPEZ: No. Obviously it's an unfortunate  
8 statement to have to deal with right now, but other than to  
9 say that I think it still remains within the equitable powers  
14:22:11 10 of the Court under the principles that really deal with these  
11 kinds of issues to provide the kind of relief that we're  
12 requesting.

13 I think -- I don't want to go through the panoply of  
14 issues that I think were something we didn't anticipate,  
14:22:33 15 but -- and I think that -- again, I -- in looking at  
16 Judge Kennelly and Judge Kincaid's rationales --

17 THE COURT: Excuse me.

18 Folks, somebody on the line has failed to mute your  
19 phone and we're hearing your activities. If you could mute  
14:22:53 20 it, please.

21 Go ahead, Mr. Lopez.

22 MR. LOPEZ: Again, Your Honor, I understand that.  
23 And, again, I think I'm just doing my job. I'm just thinking  
24 I'm doing the job that I was appointed to do. Not just me,  
14:23:03 25 but I'm doing it as the point person for not only our

14:23:08 1 executive committee but a number of other firms that have  
2 contributed significant work and -- you know, just kind of  
3 a -- a fairly significant change of circumstances.

4 I mean, I think that settlement that's happened that  
14:23:23 5 we know nothing about, it's usually the PLC or leadership  
6 that knows what's going on with settlement, and here it's  
7 just the opposite. And some of the things I think we still  
8 need to do in anticipation of remands.

9 And, again, Your Honor, it could be in the end, when  
14:23:43 10 you look at this these issues, you're going to decide that  
11 9 percent -- you're not going to award 9 percent in  
12 attorneys' fees but, again, that's something -- I don't think  
13 it's going to take years and years for us to get there. I  
14 think -- again, I want an opportunity to see if we can  
14:24:03 15 propose to you maybe a different type of cost assessment.  
16 I've got some ideas about that that may, in fact, help  
17 decrease that percentage so the clients don't to have bear  
18 more than double, I think, what the original cost assessment  
19 was.

14:24:26 20 But I think the -- as far as the fee part of this  
21 thing, I think that -- I mean, it's no secret that the work  
22 that's been done in this case started before this MDL by  
23 people that are now part of the leadership committee,  
24 Plaintiffs' Leadership Committee, and have been done by a  
14:24:45 25 number of folks since that time. And that's been used for

14:24:50 1 the benefit of whatever settlement discussions are going on  
2 now and will be used for the benefit of cases that might have  
3 to get tried in transferor courts.

4 THE COURT: All right. Let me ask you one other  
14:25:03 5 question. I understand the argument on your side that the  
6 whole purpose of a common benefit fund is to fairly compensate  
7 those who have really created the value in the case by the  
8 work of preparing cases for trial and trying some.

9 I think the other side has a pretty strong argument  
14:25:26 10 as well of unfair reliance or justifiable reliance that there  
11 were by I think February almost 2,000 cases where a term  
12 sheet was signed on the understanding that the assessment was  
13 8 percent.

14 Here's -- here's the concern that I'd appreciate you  
14:25:50 15 addressing. I went back and looked at the previous reports  
16 from Judge Corodemus, and as of May last year the report  
17 included 89 percent of all of the hours, at least in the most  
18 recent report are included, and 86 percent of all expenses.

19 So if the concern in the case is that this case was  
14:26:15 20 getting more expensive than the 8 percent would really  
21 properly reimburse, it seems to me that was pretty clear a  
22 year ago, and I'm concerned that the request to increase the  
23 holdback wasn't made until after I had ordered you to have  
24 settlement discussions, which were by November 20th of last  
14:26:36 25 year, and then even after a number of the cases had reached a

14:26:40 1 settlement in principle and reliance on the lower number,  
2 when it looks to me as though, projecting out what the  
3 expenses and hours would be, if the concern is that the  
4 8 percent won't reimburse what this case has cost, that could  
14:26:54 5 have been foreseen.

6 Would you give me your thoughts on that.

7 MR. LOPEZ: Yeah. I can say this. That, you know,  
8 obviously I think during that period of time we weren't really  
9 focused on this kind of an issue and when we started talking  
14:27:13 10 discussing settlement, I -- we had no idea at the time that  
11 there was actually this other -- we actually thought when we  
12 started these discussions last fall that the PLC, through the  
13 PEC, would come up with some kind of a program to settle cases  
14 on behalf of everyone in the MDL.

14:27:35 15 We had no idea that ongoing for almost a year  
16 already was this other settlement program that was announced  
17 to us shortly before it was announced to you. So we didn't  
18 know anything about that.

19 That might have prompted us to take a look at what  
14:27:55 20 the common benefit situation was, what our lodestar was, some  
21 of the work we anticipated going forward.

22 Could we have made that sooner? We could have. But  
23 we wanted to kind of see -- play out -- see this how this  
24 whole settlement process was going to play out so we maybe  
14:28:15 25 wouldn't have to.

14:28:17 1 But now we're sitting here, I don't know, we're  
2 about a month and three days, three or four days away from  
3 you getting a list of the cases that have to be remanded.  
4 And -- you know, I'm not saying there's no hope that this  
14:28:32 5 case can't settle between now and July 1 as to everybody  
6 but -- I don't know. I think what we're dealing with, we're  
7 dealing with a lot of unknowns about that.

8 And, again, I think the lawyers that were involved  
9 in those discussions, you know, in many ways, they benefited  
14:28:50 10 from the fact that while they were doing that and maybe even  
11 collecting a lot more cases, I wasn't doing that. I was  
12 actually -- you know, me and many others were continuing to  
13 litigate this case so that this opportunity for them to  
14 settle the case happened.

14:29:06 15 And if -- I don't think there should be an issue on  
16 whether or not the work that we did benefited them from  
17 reaching those settlements and what that benefit is, whether  
18 it's 6 percent or 9 percent is a decision you can -- I mean,  
19 it could be that when they come in, you know, here a year or  
14:29:35 20 so from now and they may make a really good argument as to  
21 why they should only pay 6 percent in assessments as opposed  
22 to 9, or whatever it is we may be asking you to do at that  
23 time.

24 But I don't -- I mean, I -- it doesn't change the  
14:29:52 25 equitable principles that should apply to the work product

14:29:57 1 and the work that we did.

2           You know, getting back to when they started these, I  
3 think they -- I've heard that these discussions actually  
4 started before the *Booker* trial and they continued until  
14:30:08 5 what -- and, again, I don't know. I'm speculating. I've  
6 heard things. You know.

7           There's a song I hear all the time that reminds  
8 me -- I mean, I just think it probably hits everybody. It  
9 says, I wish I knew what I know now when I was younger, you  
14:30:26 10 know, because what happens is you just -- you realize that as  
11 you gain more knowledge, as you move forward through  
12 processes like this, and you're doing it to the extent that  
13 you've done it and others have done it, you know, you wish  
14 you could have -- you knew back then what we know now about  
14:30:46 15 where we would be in this litigation and the quality of the  
16 work and -- and, frankly, the amount of work that needs to be  
17 done going forward. I anticipate there's going to be more  
18 trials.

19           But, anyway, I'm getting -- I'm digressing from the  
14:31:01 20 issue.

21           The issue is still going to be what's fair under the  
22 circumstances. You know, is assessing the plaintiffs an  
23 additional whatever percentage fair if, in fact, the money  
24 that was spent gave them that opportunity? I know they said  
14:31:20 25 they relied on it, but I don't see any evidence of that

14:31:24 1 having influenced that settlement at all. I mean, I've heard  
2 people say it did but I don't -- I mean, other than people  
3 saying, well, geez, we wouldn't have entered this settlement  
4 had we known that we would have had to pay -- and even  
14:31:38 5 address it. They can't do what's in the best interest of a  
6 client to settle a case based upon whether or not their fee  
7 is going to be assessed an additional 2 or 3 percent.

8 The same with costs. I mean, if the clients' costs  
9 are the clients' cost, and that cost is but a fraction of  
14:31:58 10 what that client might have been assessed had they  
11 individually been litigating that case, in fairness, should  
12 the clients still have to pay that additional cost?

13 I just don't -- I mean, I've heard a lot about that  
14 influencing settlement, about there being reliance on that,  
14:32:14 15 but I just -- I think that is a lot more speculative and  
16 there's really no evidence of that. But what's not  
17 speculative is the reports you've been given by  
18 Judge Corodemus about the number of hours that have been  
19 spent on this case and the number -- and I think we've  
14:32:35 20 clarified the cost issue at sidebar, and the amount of work  
21 that might be ahead of us.

22 It could be -- Your Honor, if all these cases settle  
23 July 1, I mean, if you entered a holdback order between now  
24 and then, and we could address the fact that, you know, all  
14:32:51 25 those things that we were anticipating happening in the



14:32:56 1 future didn't happen and we can -- you know, we can talk to  
2 others in our group and the PEC and others that have settled  
3 the case and we'll come back to you and say, you know, we  
4 don't need that holdback anymore.

14:33:09 5 The reason for the holdback, I think Judge -- I keep  
6 quoting Judge Kennelly and Judge Kincaid because I think they  
7 were faced with the same issue, is it's the uncertainty and  
8 the unknown that we need to protect, and I think the people  
9 that are going to be potentially putting in more time and  
14:33:23 10 more money into this litigation for the common benefit, and  
11 who have done that, you know, need to be able to be protected  
12 in the event we come back to you and can show you that maybe  
13 6 percent was not an appropriate assessment at the time.

14 THE COURT: All right. Thanks, Mr. Lopez.

14:33:38 15 MR. LOPEZ: Thank you, Your Honor.

16 THE COURT: Mr. North --

17 MS. ZAIC: Your Honor.

18 THE COURT: Yes.

19 MS. ZAIC: I apologize. Julie Reed Zaic on behalf of  
14:33:46 20 the Plaintiffs' Steering Committee.

21 May I make an additional comment on behalf of  
22 plaintiffs?

23 THE COURT: Yes.

24 MS. ZAIC: Again, I apologize. I will make it very  
14:33:53 25 short.

14:33:53 1 I just want to clarify something that was mentioned  
2 earlier by Mr. Goss, and I apologize I didn't catch counsel's  
3 name, an additional objector who spoke. But with regard to  
4 the preemption filing, I agree that preemption filings are  
14:34:06 5 common, they're anticipated in MDLs.

6 But the preemption motion filed by Bard in this  
7 matter was not of the kind that is normally seen in an MDL.  
8 It was, to my knowledge, unprecedented in the MDL with regard  
9 to the legal theory that they brought forward.

14:34:22 10 There were probably two to three individual district  
11 court cases with published opinions prior to Bard filing that  
12 motion, whereas a preemption motion is usually filed at the  
13 outset of litigation or at the end during the dispositive  
14 phase.

14:34:38 15 If you recall, Your Honor, Bard actually asked for  
16 leave from the Court to file their papers at the time that  
17 they did, which was March of 2017. The legal theory  
18 encompassed how individual the issue was to Bard, and it was  
19 treated differently than preemption motions that are normally  
14:34:56 20 anticipated are usually treated in a court.

21 If you recall, Your Honor, we actually took on a  
22 separate discovery track. We incurred additional expenses  
23 and time with preparing expert reports and additional  
24 discovery on those reports specific to this individual  
14:35:16 25 preemption issue. The papers were filed in March 2017, and

14:35:21 1 the time that it took for several PSC firms who stepped aside  
2 to handle that matter culminated in an oral argument that did  
3 not take place until a week before Thanksgiving, 2017. It  
4 was ten months.

14:35:37 5 I'm sure Your Honor recalls the voluminous filings,  
6 Your Honor's clerks certainly remember the voluminous  
7 filings.

8 But I just wanted to make that clarification with  
9 regard to preemption in this matter and a legal theory that  
14:35:48 10 was used. I especially wanted to clarify the record -- I  
11 apologize, but when the word malpractice was actually placed  
12 on the record, I feel compelled to make the clarification.

13 Thank you.

14 THE COURT: All right. Thanks, Ms. Zaic.

14:36:01 15 I do think the malpractice comment was directed at  
16 defense counsel, not plaintiffs, but I understand your point.

17 Mr. North, the question I had was, from Bard's  
18 perspective, what do you anticipate in the way of trial  
19 preservation depositions of experts or corporate witnesses  
14:36:22 20 that need to be done in this MDL?

21 MR. NORTH: We actually were having a discussion  
22 about that yesterday, Your Honor. Right now we are  
23 anticipating probably three to five at most.

24 THE COURT: Of whom? Generally. What categories?

14:36:39 25 MR. NORTH: Not experts. A couple of corporate

14:36:42 1 witnesses. Probably Ms. O'Quinn, the regulatory person who no  
2 longer works at Bard. Probably a couple of other employees  
3 that have moved on and therefore it's difficult to bring them  
4 live. So my best estimate is three to five at most.

14:37:04 5 THE COURT: So you're not inclined to take expert  
6 preservation depositions?

7 MR. NORTH: Not right now, Your Honor, no.

8 THE COURT: If the cases go back and there's going to  
9 be ten trials, then your view is that those experts should  
10 appear in all ten cases as opposed to being subject to a trial  
11 deposition that could be played in all ten cases?

12 MR. NORTH: I believe so, Your Honor, but I believe  
13 the odds of that happening are not particularly great. I  
14 believe we're going to see a lot of these cases resolve before  
15 they're ever remanded. And I also believe there are not going  
16 to be that many trials once they are remanded in that the  
17 remand itself will spur settlement on a lot of these. If it  
18 doesn't before the remand.

19 It is possible we might do -- we talked about one  
14:37:50 20 expert, but he's a very limited issue expert and not one of  
21 the major ones. We do not plan to do at this point major  
22 preservation depositions of all of the experts.

23 If I change our thinking I will let the Court know  
24 that, but that is our preliminary sort of decision in our  
14:38:08 25 initial discussions.

14:38:09 1 THE COURT: Okay. Thanks.

2 Mr. Lopez, did you want to comment on that issue  
3 specifically?

4 MR. LOPEZ: Yeah. I think that -- you know, maybe  
14:38:16 5 we're different positions with respect to experts. I think we  
6 need to probably preserve every generic expert on the  
7 plaintiff side for preservation.

8 Defense counsel has maybe different ideas about that  
9 or different access or different resources. But I think --  
14:38:38 10 you know, I mean, in fairness to the lawyer and our country  
11 courthouse who has limited resources to somebody who has  
12 unlimited resources, I think we have to make that expert  
13 available to him or her. And the only sure way of doing that  
14 is to do preservation depositions of our experts.

14:38:59 15 THE COURT: All right.

16 Thank you all for your arguments. I'll take this  
17 under advisement and I think get a decision out within the  
18 next few days. It won't take long.

19 Thank you all.

14:39:11 20 MR. LOPEZ: Thank you, Your Honor.

21 MR. NORTH: Thank you.

22 (End of transcript.)

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C E R T I F I C A T E

I, PATRICIA LYONS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control, and to the best of my ability.

DATED at Phoenix, Arizona, this 6th day of June, 2019.

s/ Patricia Lyons, RMR, CRR  
Official Court Reporter